82-946

IN THE SUPREME COURT OF THE
UNITED STATES

* * * * * * * * * * * * * * * * * * * *

NO.

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LARRY WAYNE BOX,

Petitioner

V.

THE STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

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J. WILSON DINSMORE
ATTORNEY FOR PETITIONER

DINSMORE, WAITES & STOVALL
AGE HERALD BUILDING
2107 5th Avenue North
Suite 100
Birmingham, AL 35203
Phone: (205) 252-9751

QUESTION PRESENTED

Whether the warrantless search and seizure of Petitioner and Petitioner's automobile was justified under the probable cause exception to the Fourth Amendment of the United States Constitution and absent a showing that the incriminating objects were in "plain view" or apparent to officer at the time of seizure.

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TABLE OF AUTHORITIES

CASES:

Coolidge v. New Hampshire, 403 U.S. 443 (1971).

Daniels v. State, 290 Ala. 316, 276 So. 2d 441 (1973).

Foy v. State, 387 So. 2d 321 (Ala. Ct. Crim. App., 1980).

Henry v. U.S., 361 U.S. 98, 4 L.Ed. 2d 134, 80 S.Ct. 168 (1959).

Kinard v. State, 335 So. 2d 924 (Ala. Sup. Ct., 1976).

Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

Shipman v. State, 291 Ala. 484, 282 So. 2d 700 (1973).

Stanley v. Georgia, 394 U.S. 557 (1968).

ARTICLES:

Bloodworth, Where Search and Seizure is Today, 40 Alabama Lawyer 444 (October, 1978).

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

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Petitioner, Larry Wayne Box, prays that a Writ of Certiorari be issued to review the judgment of the Alabama Court of Criminal Appeals entered on June 29, 1982, affirming his conviction under the provisions of Title 20 Section 2-20 et seq, otherwise known as the Alabama Uniform Controlled Substances Act. As charged in his indictment, and that upon such hearing being granted, the judgment of conviction be reversed.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals (app. A., infra,. p. 1a) has been reported and is included herewith. Certiorari was denied by the Alabama Supreme Court without opinion.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on June 29, 1982, and following a refusal of certiorari by the Alabama Supreme Court, a stay of mandate pending possible review by this court was granted until November 17, 1982.

The Court has jurisdiction under U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and Title 20, Section 2-20, et seq., Code of Alabama 1975.

STATEMENT OF THE CASE

The Petitioner, Larry Wayne Box, along with one Danny Bice were on November 17, 1979, in unlawful possession of controlled substances (cocaine and marijuana) contrary to and in violation of the provisions of the Alabama Uniform Controlled Substances Act. The State contended that the case arose out of a surveilance by narcotic officers, prompted by information received from a confidential informant, that narcotic activity involving Petitioner and Bice was occurring at a house in Birmingham, Alabama allegedly occupied by Petitioner.

On November 14, 1979, a search warrant was issued for a home located at 2729 Center Point Road, Birmingham, Jefferson County, Alabama. Sgt. Brooks who was assigned to the narcotic detail in November

1979, set up surveilance on the home. He observed Box, an individual named Danny Bice and others at the home at various times over the next few days. He observed Mr. Box removed some garbage bags from the home during this period and attempted to stop him leaving on two occasions prior to the subsequent search and seizure. Sgt. Brooks testified he had not seen Mr. Box do anything wrong in violation of any traffic laws.

On November 17, 1979, Box was seen arriving at the house in his automobile. He got out of his car and went to a weeded area near the house. Box search around in the weeds for a short time and picked up some small plastic bags which were seen to contain something white in the bottom of the bags. Box was then stopped by law officers as he attempted to leave the premises in his car and arrested. A paper sack was taken from an open purse lying on the front seat of the car. The purse belonged to a female passenger occupying the car with Box. The sack was later found to contain a white powdery substance identified as cocaine. After the arrest of Petitioner, the warrant was executed and the

house searched.

It is clear that on the day of the arrest of Box, and the entry into the house, Box did not enter the premises. The arrest report stated that the white powder was concealed in the girl's purse in a brown paper bag.

Furthermore, the evidence is without dispute that Box was not in the house, or any of the houses, at 2729 Center Point Road, Jefferson County, Alabama. Yet, the search warrant was served on him. And he was NOT named as a resident in the warrant, now was the name of Box mentioned in the affidavit to obtain the search warrant.

Given these facts, together with others to be mentioned, the analysis of this case now on appeal warrants a discussion of: (1) the search warrant and the search, (2) the arrest of Box, and (3) the seizure of the material which later proved to be cocaine from the purse of the girl passenger in the automobile of Box on November 17, 1979.

REASONS FOR GRANTING THE WRIT

The most basic constitutional rule pertaining to warrantless searches states that such searches "'are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn' and these must be a showing by those who seek exception . . . that the exigencies of the situation made that course imperative.' 'The burden is on those seeking exemption to show the need for it.'" Coolidge v. New Hampshire, 403 U.S. 443, (1977). It is submitted that the arresting officer had no reasonable grounds to believe that Petitioner was at the time of his arrest committing a crime or was otherwise engaged in any activity which could have given rise to probable cause to effect an arrest or search.

There is no evidence in the record that the law enforcement officer had identified the substance in the plastic bags which Box obtained from the weeded area near the house as cocaine, or that he reasonably thought the substance to be cocaine, contraband, or a controlled substance.

The arresting officer further admitted that Box had violated no law, and was violating no law at the time the vehicle was stopped.

The plastic bags, which proved later to contain cocaine, were in a brown paper bag, and were not visible until the bag was opened. Further, the report shows that this paper bag was concealed in the purse of the girl passenger in the car.

The search and seizure, or seizure, rules apply here, and a compilation of the federal, and some state, cases on the subject is contained in Bloodworth, Where Search and Seizure is Today, 40 Alabama Lawyer 444 (October, 1978).

Of primary importance to this case are Shipman v. State, 291 Ala. 484, 282 So. 2d 700 (1973); Daniel v. State, 290 Ala. 316, 376 So. 2d 441 (1973); Kinard v. State, 335 So. 2d 924 (Ala. Sup. Ct., 1976). See also, Foy v. State, 387 So. 2d 321 (Ala. Ct. Crim. App., 1980).

Based upon the foregoing authorities, it is submitted that the arresting officer had no reasonable grounds to believe that Box was at the time of his arrest committing a crime or was otherwise engaged in any activity which could have given rise to probable cause

to effect an arrest or search. The officer admitted that at the time Box was violating no law, and he did not, prior to the arrest, have any judgment about was was contained in the plastic bags which Box obtained from the field. There is no statement in this record of any such judgment.

There was no cry by either of the occupants of the car about "dope," as occurred in Foy, supra. Evidence similar to that which appears in Foy to uphold probable cause simply is not present in this case. While there may have been a "good faith" arrest, there were no other facts and circumstances which would lead a prudent man to believe that Box had committed or was committing any crime. See Henry v. U.S., 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959).

Thus, it is submitted, the evidence seized from the automobile of Box on November 17, 1979, was incident to an unlawful arrest, and, hence, was inadmissible. See Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

The present case is remarkably similar to the facts in Kinard, supra. There the Alabama Supreme Court held there could be no justification for the

initial intrusion where there was only a stop of a vehicle for an I.D. check, and, further, that the "plain view" doctrine was applicable where the incriminating nature of the object was not apparent to the officer at the time of its seizure. In the present case, it is without question that the incriminating nature of the contents of the brown bag was not apparent until the bag had been opened, if then.

In Coolidge, supra., the United States Supreme Court stated that the "plain view" cases have a common factor. This common denominator is that the officers in each case had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The extension of this justification can be approved only where it is immediately apparant to the police that they have evidence before them. The "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating is discovered. Stanley v. Georgia. 394 U.S. 557, (1968).

Thus, even assuming, without conceding, that the stop here was justified, there could be no seizure because the incriminating nature of what was in the brown paper bag was not apparent to the seizing officer. Shipman, supra.

This rule is stated in Shipman, thusly, at 291 Ala. page 448:

> "For an item in plain view to be validly seized, the officer must possess some judgment at the time that the object to be seized is contraband and that judgment must be grounded upon probable cause. The record in this cause reveals that this requirement has not been met."

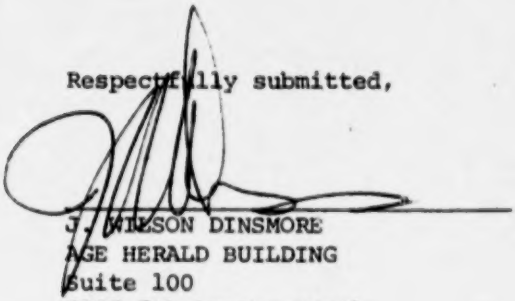
The requirement was not met here because there is nothing in the record to show that the officer had any probable cause which could lead to a judgment that there was cocaine, or other contraband, in the brown paper sack seized from Petitioner's car.

The constitution demands redress. The Petitioner pleads for it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

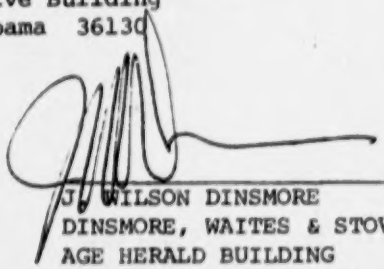


J. WILSON DINSMORE
AGE HERALD BUILDING
Suite 100
2107 5th Avenue North
Birmingham, Alabama 35203
Phone: (205) 252-9751

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed, postage prepaid, this the 12th day of November, 1982, to:

Honorable Charles A. Graddick
Attorney General - State of Alabama
250 Administrative Building
Montgomery, Alabama 36130



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